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Supreme Court of the United States

OCTOBER TERM, 1944.

(No. 138)

GRAYBAR ELECTRIC COMPANY, INC.,
Petitioner,

against

NEW AMSTERDAM CASUALTY COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

GRAYBAR ELECTRIC COMPANY, INC.,
Petitioner,

BREED, ABBOTT & MORGAN,
Attorneys for Petitioner.

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PETITIONER'S REPLY BRIEF.

Respondent's arguments, included under Point II of its brief in opposition to petitioner's application for a writ, are misleading, even if inadvertently so.

A.

The provisions of the Tennessee short statute of limitations relating to the giving of written notice are not different in character from the provisions of the same statute specifying the time within which suit shall be maintained in the Courts of Tennessee.

That just such a statutory requirement of preliminary notice affects merely the remedy, and in this respect is as clearly remedial as the requirement for the commencement of suit within the prescribed statutory period, is illustrated by this Court's own holding in *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276. Construing an identical Minnesota statute, this Court said (p. 285 of its Opinion):

> "In the case now before us, we agree with the Minnesota Supreme Court in the view that *the*

> *requirement of a preliminary notice to the obligors as a condition precedent of an action upon the bond, affects the remedy and not the substantive agreement of the parties.* And although the statute as it stood when the bond was given (R. L. 1905, §4539) must, under *Grant* v. *Berrisford, be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation.*" (Italics ours.)

This is the normal and customary interpretation of such a statute. No radical departure from this generally accepted current of authority such as that contended for by the respondent should be imputed to the Supreme Court of Tennessee.

The familiar principle is well stated in *Meisenheimer* v. *Kellogg,* Supreme Court of Wisconsin, 106 Wis. 30, 81 N. W. 1033:

> "The radical difficulty with this argument (i. e. that the giving of notice was a condition precedent to the cause of action) is that *the notice required by the statute above mentioned is not a condition precedent to the cause of action, but is merely a statute of limitation.* The distinction was clearly pointed out in the recent case of Relyea *v.* Pulp Co., 102 Wis. 301, 78 N. W. 412. It was there stated, in substance, that a notice required to be given before the commencement of a purely statutory action (such as an action against a city for injuries resulting from a defective highway) is necessarily a condition precedent to the cause of action, because, the entire right of action being given by statute, it only comes into existence when the required notice has been given, but that the notice required to be given by statute prior to the commencement of an action to enforce a common-law right, such as the case now before us, is *necessarily a statute in the nature of a statute of limitations,*

> *because the right exists without the aid of any statute.* No argument in support of this conclusion would seem to be required, *the right of action existing independently of statute.* The requirement of notice within a certain time simply sets a new time limit within which a certain step necessary to enforce the right must be exercised. It is not a condition which must exist before any right comes into being." (Italics ours.)

The right of action at common law on such a bond as the present one, independently of statute, has often been recognized by the Tennessee Court (see cases cited, p. 17, Petitioner's Main Brief) and by this Court in *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657 (p. 17, Petitioner's Brief).

The distinction is well put in *Kansas City Hydraulic Press Brick Co.* v. *National Surety Co.*, 167 Fed. 496 (pp. 505 and 506):

> "In the present case, while the statute required the contractor to furnish a bond, the right of action is not created by the statute. It imposed no liability upon the defendant. On the contrary, defendant's liability arises solely out of contracts into which it voluntarily entered for a valuable consideration. In the case of statutes creating stockholders' liability, the cause of action rests much more closely upon the statute than in the present case, and yet it is held that the limitation in such statutes is not a part of the right. The liability, 'though statutory in its origin, is contractual in its nature.' Ramsden *v.* Knowles, 151 Fed. 721, 724, 81 C. C. A. 105, 108, 10 L. R. A. (N. S.) 897. The limitation in the present case, therefore, is no part of the right, but relates exclusively to the remedy."

Finally within the familiar principle of law (as restated by this Court in *Midstate Horticultural Co. Inc.* v. *Pennsylvania Railroad Co.*, 320 U. S. 356) that the provisions of remedial statutes may alone be waived but not conditions precedent to a cause of action, the Tennessee Court's action in the *City of Knoxville* v. *Burgess*, ... Tenn. ....., 175 S. W. (2nd) 548, case (Appendix A), in remanding the case on the issue of waiver, is proof positive that the highest Court of that State regards the statute as remedial.

In fact that Court, in its remanding order, characterized this very statute as a statute of limitations, saying:

> "3. This cause is remanded to the Chancery Court of Knox County to the end that appellee New Amsterdam Casualty Company may be required to answer the averments of the cross-bill of Aluminum Company of America, and particularly the averments thereof with respect to the alleged waiver of or estoppel to rely upon the defense of the *statute of limitations*, and for further proceedings in conformity to the opinion of this Court, which opinion is ordered filed and made a part of the record herein." (Italics ours.)

B.

There has never been any determination by the Tennessee Courts that the Tennessee statute has any application whatsoever except to the rights of parties litigant who seek relief in the Courts of that State. The language of all of the decisions of the Courts of Tennessee has been confined to suits within that State.

The Courts of that State have not had, so far as the reported decisions disclose, occasion to pass upon the rights under such a bond as that in suit when such rights have been established by a judgment entered in another forum. Petitioner respectfully asserts that the Courts of the State

of Tennessee would be required to give full faith and credit to a judgment so obtained in the Courts of another State, although the terms of the Tennessee statute were not complied with.

Respondent in effect imputes to the Courts of Tennessee not only a decision which thus far those Courts have never made, but which, if made, might contain serious constitutional infirmities.

C.

The fears expressed by the respondent (p. 8 of its Brief), as to the confusion which it claims will result if petitioner's position is sustained and the lack of uniformity which it asserts will result therefrom, are quite unfounded.

In fact, respondent's assertion (Respondent's Brief, last paragraph, p. 8) of the principle that rights under a contract should be determined by the law of the State where it is to be performed, amounts to an acknowledgment that the petitioner's recovery here was just and proper.

Respondent has lost sight of the fact that the contract in question was one made between the respondent, a New York corporation, and petitioner, likewise a New York corporation. That contract called for nothing more in the way of performance than payment by the respondent-debtor to the petitioner-creditor, which payment, in accordance with elementary rules of law, was to be made within the State of New York.

The contract sued upon is a contract between residents of the State of New York. It has been sued upon in that State and, with respect to this plaintiff at least, it was to be performed in the State of New York. How such a contract can possibly be validly held to be affected by a Tennessee statute, characterized by the highest court of that State as a Statute of Limitations, is difficult to see.

Petitioner respectfully requests that the writ prayed for should be granted.

Dated: July 19, 1944.

Respectfully submitted,

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Appendix A.

IN THE

SUPREME COURT OF TENNESSEE,

SEPTEMBER TERM, 1943.

KNOX EQUITY—CAUSE NO. 3.

CITY OF KNOXVILLE,

vs.

MELVIN F. BURGESS, INC., *et al.*

Reversed and Remanded.

Be it remembered that on this 20th day of November, 1943, this cause came on to be finally heard upon the transcript of the record from the Chancery Court of Knox County, the assignment of errors filed in behalf of appellant, Aluminum Company of America, the briefs of *amici curiae* representing Southern Wood Preserving Company and Graybar Electric Company, and the entire record at large, from a consideration of all of which the Court doth adjudge and decree as follows, to-wit:

1. That there is no error in the decree of the Chancellor with respect to the character of the bond or undertaking sued on in the cross-bill of appellant, Aluminum Company of America, said holding being that, insofar as said bond or undertaking inures to the benefit of furnishers of labor or materials, the same is a statutory bond and subject to all of the provisions of Section 7955-7959 of the Code of 1932.